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MANDAMUS COMMANDING INSPECTORS OF ELECTIONS TO COUNT
VOTES EXCLUDED BY MISUNDERSTANDING OF ELECTION LAW.

In the recent case of the *People of New York ex rel. McLaughlin v. Ammenwerth, et al.*, N. Y. Law J., Vol. 42, No. 103, the Court of Appeals of New York passed upon a point never before decided by that Court and one upon which there appear to be few decisions. The case arose out of the general election of last November for the office of Municipal Court Justice of the Fourth District. After the conclusion of the election, the inspectors canvassed the votes and filed their certificate, as required by law, in the Clerk's office of the County of Queens. Seventeen ballots were protested as being marked for identification and, as required by statute, were so indorsed by the canvassers and placed in a sealed envelope and deposited as required by law. Under the terms of the statute, the inspectors should have counted these ballots leaving their validity to be thereafter determined in a special proceeding taken for the purpose. Acting under a misunderstanding of this election law, however, the canvassers did not count these ballots. This action was brought for a peremptory writ of mandamus directing them to canvass the protested ballots and after the canvass to correct their returns in conformity with the result of such canvass. The Court of Appeals affirmed the order granting the mandamus by a vote of five to two.

Where inspectors and judges of elections have wholly failed or refused to perform their duties in counting the ballots and making returns in accordance with the statute requirements, there is no doubt of the right of the courts to issue a peremptory writ of mandamus ordering them to convene and fulfill the duties of their offices. *People ex rel. Sturtevant v. Armstrong*, 116 N. Y. App. Div. 109; *People ex rel. Smith v. Schiellein*, 95 N. Y. 124; *Taylor et al. v. Kolb*, 100 Ala. 603.

On the other hand, mandamus will not lie, at least in New York, to order an entire recount of the ballots already counted by the inspectors. *Hearst v. Woelper*, 183 N. Y. 284; *Corbett v. Naylor*, 25 R. I. 520. It is a settled principle of the New York Court that the results of an election should be speedily ascertained, the result declared, and certificates of elections upon such declared results issued to those persons who, upon the face of the returns,

have been elected to public office. *People ex rel. Brink v. Way*, 179 N. Y. 174.

The greatest number of cases arise under some variety of circumstance like that in the principal case where the canvassing board has incompletely discharged its duties, either through error or fraud on their part. Considerable difference seems to exist among the various states as to when a mandamus will be granted to compel a board to convene and correct their error.

Some cases have held that when the board has filed its certificate and has dissolved, the matter is wholly out of their jurisdiction and they have become *functus officio*, and despite whatever errors they may have committed, mandamus will not lie to compel them to correct them. If the board has erred the errors must be corrected by some other tribunal, usually in a *quo warranto* proceeding. The office is already filled by a person holding by color of right. *State ex rel. Bland v. Redman*, 43 Mo. 256; *People v. Supervisors of Greene*, 12 Barb. (N. Y.) 217. On the holding in this latter case, Chief Justice Cullen bases his dissent in the principal case, holding that after an election return has once been made, the same cannot be altered, but the only remedy for error or fraud must be found in *quo warranto*. It appears, however, that neither the decisions of the Court of Appeals of New York nor those of many other jurisdictions justify this expression of opinion as the generally accepted rule.

In re *Stewart*, 155 N. Y. 545, where the New York Court perhaps showed its greatest liberality in granting a mandamus, the Court said: "The theory of a proceeding asking for a peremptory writ of mandamus requiring the inspectors of elections in the districts named to convene and make correct returns of the vote cast in such districts for said officers, is that, inasmuch as the inspectors have through error or otherwise made a false return contrary to their duties under the law, the Court must intervene and authorize, and, if need be, compel them to make a true return. This is wholly independent of the Election Law itself and rests upon the fundamental and elemental principle that every public officer can be compelled by the Court to perform the duties pertaining to his office."

In many other jurisdictions the Courts have shown a willingness to grant mandamus when canvassing boards incompletely

discharge their duties. In *People v. Nordheim*, 99 Ill. 553, the Illinois Court held that *functus officio* does not take effect when canvassing boards have dispersed before having completed the canvass. The office of canvassers being largely ministerial, they will be required to count all the votes and will not be allowed to disfranchise voters by failure to count certain votes through some informality which can be corrected before the canvassers. *People ex rel. Fuller v. Hilliard*, 29 Ill. 413.

In *re Strong*, 20 Pick. (Mass.) 484, the Massachusetts Court said: "Generally in all cases of omissions or mistakes where there is no other adequate specific remedy, resort may be had to mandamus." A board of canvassers had refused to give a certificate of election to an officer elected and had ordered a new election. Mandamus was held to lie to compel the board to give the certificate although the Court admitted that *People v. New York*, 3 Johns Cas. 79, was *contra*. And it could hardly be maintained that the above statement by the Massachusetts Court could be reconciled with the statement of the Rhode Island Court in *Corbett v. Naylor*, *supra*, where that Court said: "The function of a mandamus is to compel the performance of a legal duty, to command action, not to review action. It does not lie to correct mistakes that have been made or to remedy wrongs that have been done or to undo that which has been done." The reasoning in this case agrees somewhat with that of the dissenting justices in the principal case and shows a desire to draw a sharp distinction in legal effect between completing their unfinished duties and correcting the erroneous performance of their duties as a justification for granting a mandamus writ.

A similar decision was reached in *Kisder v. Cameron*, 39 Ind. 488, where the Court authorized a mandamus to compel a board of canvassers to give a certificate to a party elected.

Unless the ballots have been returned to the county clerk and are beyond the control of the board, the Nebraska Courts will issue a mandamus to compel the canvassers who neglect or refuse to fully perform their duty, to discharge that duty. *State v. Dinsmore*, 5 Brown (Neb.) 145; *State ex rel. Waggoner v. Russel*, 34 Neb. 116.

In *Kummel v. Dealy*, 112 Ia. 503, the board of supervisors failed to properly certify and authenticate and refused to permit the judges, who appeared before them at the same session, to cor-

rect any errors. It was held that mandamus would lie to compel the board to permit such correction since it was the only remedy available to complainant voters.

A case clearly opposed to the rule of *The People v. Supervisors of Greene, supra*, is *State v. Gibbs*, 13 Fla. 55, where the canvassing board had met and made its canvass of all the returns of the election which had been received by them on the legal day for proceeding with the canvass, yet, afterwards, other and further returns of the election were received by them, but the board adjourned without including these latter returns in the canvass. A mandamus would have been granted requiring the board to reassemble and complete the canvass of all the returns in their possession but for the fact that the statute had been repealed under which they exercised their authority as canvassers. And in *State v. McCoy*, 2 Marv. (Del.) 576, it was held that the decision of the Florida Court could not be accepted as the law in that jurisdiction and granted a writ of mandamus to compel the canvassers to reassemble when the board of canvassers had failed to properly count the vote, although that portion of the election law under which the board had exercised their authority had been repealed and other officials had been constituted a new board in their place.

It must be remembered that a proceeding under the writ of mandamus does not necessarily determine the ultimate right. Thus, it has been applied when it could determine but one step in the progress of inquiry and when it could not finally settle the controversy, but it might be necessary to resort to *quo warranto*, an injunction, or a contest of election under the statute. *Ex parte Strong, supra*; *People v. Kilduff*, 15 Ill. 492.

From these decisions it would appear that the rule laid down in the principal case was in line with the weight of authority in granting a peremptory writ of mandamus for the purpose of compelling the inspectors of elections to conform to all the provisions of the Election Law in counting the votes.